Supreme Court, U. S.
FILED
MAY 17 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Case No. 77-1418

CONSOLIDATED MOTOR INNS, *Petitioner,*

v.

ALIAS ENTERPRISES, INC., *Respondent.*

OBJECTION TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF BVA CREDIT CORPORATION

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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Pursuant to Rule 42(c) of the rules of this Court, Petitioner, Consolidated Motor Inns, hereby files this statement of opposition to the motion of BVA Credit Corporation (hereinafter "BVA"), and states its reasons as follows:

A. BVA Should Not Be Allowed to Participate in This Case Since It Previously Dismissed Its Appeal From the Order of Confirmation Entered by the Bankruptcy Court in This Case.

In its motion, BVA states that it did not appeal the Arrangement (Motion page iii). This statement is not completely accurate.

On October 30, 1975, BVA filed a purported Notice of Appeal from the Order of Confirmation entered by

the Bankruptcy Court. See EXHIBIT "A" attached hereto.

Then, on November 11, 1975, BVA dismissed its Notice of Appeal by memorandum to the Clerk of the District Court. See EXHIBIT "B" attached hereto.

BVA, by its own statement, was a creditor of the Petitioner, had standing to file a Notice of Appeal from the Order of the Bankruptcy Court confirming Petitioner's Plan, did file a Notice of Appeal, and then voluntarily withdrew same.

From that point forward, BVA, knowing that the Appeal of another creditor was in progress, took no action to intervene in said Appeal or participate therein. Rather, BVA sat by hoping to achieve some benefit from an appeal prosecuted by another, without having any attendant burdens or responsibilities to prosecute same.

Without discussing the merits of the brief filed by BVA with its motion, Petitioner would comment that BVA's attempt to use Rule 13a of the Fifth Circuit Court of Appeals' Rules as an excuse for its lack of participation is without merit.

As previously pointed out to the Court, Petitioner specifically advised the Fifth Circuit Court of Appeals in its response to the motion of Alias Enterprises, the Respondent, to dismiss the appeal for mootness, that it would not be proper for the Court of Appeals to dismiss the Appeal unless it also required the District Court to vacate its Order since otherwise the possibility would be left open that other creditors (such as BVA), who did not appeal the confirmation of the Plan might take advantage of the Order of the District Court holding invalid a part of the Order of Confirmation, and for this reason, Petitioner would have the right to prosecute the Appeal notwithstanding the settlement with Alias (See Appendix to Petition for Writ of Certiorari at p. 27a).

Furthermore, as stated in Local Rule 13a of the Court Rules of the Fifth Circuit Court of Appeals, the Certificate of Parties and Interested Persons is furnished in order that the Judges of the Court of Appeals might evaluate possible disqualification or recusal. Nowhere in the rule is it suggested that such lists can or will be used to evaluate the impact of a dismissal of an appeal for mootness, and Petitioner submits that the argument of BVA suggesting that the Court of Appeals so used the certificate is without merit.

B. By Its Motion to File a Brief as Amicus Curiae, BVA Is Seeking to Inject Into This Proceeding Considerations Which Are Totally Irrelevant to the Issue of Whether the Court of Appeals Erred in Refusing to Vacate the Order of the District Court Below, and Which, in Fact, Point Out the Danger Faced by Petitioner if Such District Court Order Is Allowed to Stand and for That Reason BVA's Motion Should Be Denied.

BVA argues, essentially, that the Court of Appeals was not required to vacate the District Court's Order in this matter because the District Court "merely" determined that the Order of the Bankruptcy Court discharging the partners of Petitioner and their wives from liability for the debts of Petitioner was void and of no effect because the Bankruptcy Court lacked jurisdiction. According to BVA, the Order of the Bankruptcy Court could be attacked at any time under the provisions of Rule 60(b)(4) of the Federal Rules of Civil Procedure; therefore, Petitioner has no reason to complain of the District Court's "mere" declaration

that the judgment of the Bankruptcy Court was void *ab initio.*

Petitioner did not in its appeal to the Court of Appeals and does not now concede that the Bankruptcy Court lacked jurisdiction to enter those provisions of the Order of Confirmation alleged to have been declared void by the District Court in its Order of February 20, 1976. Furthermore, Petitioner would point out, for the purposes of this motion, that as to BVA, who had the opportunity to appeal the Order of Confirmation, and did not do so, the provisions of said Order would, except for the existence of the District Court Order which Petitioner was unable to have reviewed on appeal, be valid, binding, and *res judicata* as to any action subsequently taken by BVA against the individual partners of Petitioner and their spouses.

In this regard, See *Stoll* v. *Gottlieb,* 305 U.S. 165, 83 L.Ed. 104, in which this Court ruled that the Order of a Bankruptcy Court in a proceeding for the reorganization of a corporation under § 77B of the Bankruptcy Act approving a proposed Plan of Reorganization which provided, in pertinent part, for the release of a guaranty by one of the principals in the corporation, was valid, binding, and *res judicata* of the jurisdiction of the Bankruptcy Court to enter such an Order where the party seeking to enforce the guaranty had the opportunity to litigate the question of jurisdiction and chose not to do so, regardless of whether the power of the Bankruptcy Court to deal with the subject matter of a guaranty was strictly jurisdictional or quasi jurisdictional.

This opinion was amplified by this Court in the case of *Chicot County District* v. *Bank,* 308 U.S. 371, 84

L.Ed. 329, 60 S.Ct. 317, in which this Court determined that when a party has failed to raise a question and have it finally determined, such party is not privileged to remain quiet and seek to raise such jurisdictional question in a subsequent suit, since such conduct would violate the well settled principles of *res judicata.*

In a case which is directly in point as to the rights of BVA, the Supreme Court of California in *Levy* v. *Cohen,* 361 P.2d 561 (1977), ruled that a provision in a Plan of Arrangement under Chapter XII of the Bankruptcy Act which discharged the partners of the debtor partnership individually from the liabilities of the partnership was valid, binding and *res judicata* in a subsequent suit brought by a creditor of the partnership on the individual liability of the partners where such creditor had notice of the meeting at which such plan was accepted and failed to appeal the provisions thereof.

Under the rationale of these decisions, therefore, BVA, having not appealed from the Order of Confimation of the Bankruptcy Court, would, but for the existence of the District Court Order of February 20, 1976, be precluded from bringing a suit against the individual partners and their spouses.

Although Petitioner would contend, given the opportunity and the forum in which to do so, that BVA, as a dissenting minority creditor in a class which voted by the requisite majority to accept the provisions of the Debtor's Plan, would nevertheless be bound thereby even if it had followed the proper procedure of appealing the Order of Confirmation, BVA affirmatively chose not to prosecute an appeal by its conscious act of first filing a Notice of Appeal and then dismissing same.

BVA should be bound by the principles of *res judicata,* and for that reason its motion to file a brief *amicus curiae* in this Court should not be granted.

Respectfully submitted,

/s/ ROBERT E. HICKS
Robert E. Hicks
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Atlanta, Georgia 30303

Attorney for Consolidated Motor Inns

Of Counsel:

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Suite 3401, 101 Marietta Tower
Atlanta, Georgia 30303

EXHIBIT "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN THE MATTER OF:

CONSOLIDATED MOTOR INNS, Debtor

IN PROCEEDINGS FOR AN ARRANGEMENT UNDER CHAPTER XII

CASE NO.: B75-296A

(FILED OCTOBER 30, 1975)

Notice of Appeal to District Court From an Order of a Bankruptcy Judge

BVA Credit Corporation, Equipment Leasing Division appeals to the district court from the Order of the bankruptcy judge entered in the above styled case on the 21st day of October, 1975 entitled: "NOTICE OF ORDER OF CONFIRMATION OF PLAN AND DISCHARGE."

The original party to the Order appealed from is:

Consolidated Motor Inns

The name and address of the original party's counsel is:

Heyman & Sizemore
Suite 300
Fulton Federal Building
11 Pryor Street
Atlanta, Georgia 30303

The parties to whom said Order operates to create a transfer of interest are:

Consolidated Motor Inns, Inc.,
Samuel H. Butrill, an individual,
Emily Butrill, an individual,

Larry C. Morris, an individual,
Kay Morris, an individual,
Duncan A. Roush, an individual,
J. W. Trunnell, Jr., an individual,
Jewell Trunnell, an individual.

The name and address of their counsel is:

Somers & Altenback
Attorneys at Law
6735 Peachtree Industrial Boulevard
Atlanta, Georgia 30340

Dated at Atlanta, Georgia this 30th day of October, 1975.

WATKINS & DANIELL
Attorneys for Appellant
BVA Credit Corporation,
Equipment Leasing Division

/s/ By: ARTHUR B. SEYMOUR
Arthur B. Seymour

1600 First Federal Building
Atlanta, Georgia 30303
(404) 522-2322

EXHIBIT "B"

LAW OFFICES OF

WATKINS & DANIELL

SUITE 1600 FIRST FEDERAL BUILDING

ATLANTA, GEORGIA 30303

November 11, 1975

ALLAN WATKINS (1908-1961)
PAUL M. DANIELL
K. EDWARD WOLCOTT

ARTHUR B. SEYMOUR

TELEPHONE
522-2322
(AC-404)

MAILING ADDRESS:
P.O. BOX 872
ATLANTA, GEORGIA 30301

(FILED NOVEMBER 12, 1975)

Memorandum

To: Ben H. Carter, Clerk
United States District Court
Northern District Of Georgia

FROM: Arthur B. Seymour
Attorney for BVA Credit Corporation

RE: Notice of Appeal to District Court
From an Order of a Bankruptcy Judge
Date Filed: October 30, 1975

In the Matter Of:

Consolidated Motor Inns, Debtor

In Proceedings for an Arrangement Under Chapter XII

Case No.: B 75-296 A

This Notice will not be acted upon by BVA Credit Corporation. Please remove it from active status.

/s/ Arthur B. Seymour
Arthur B. Seymour
Attorney for
BVA Credit Corporation
Equipment Leasing Division